Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
High-Cost Universal Service Support	)	WC Docket No. 05-337
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
Lifeline and Link-Up	)	WC Docket No. 03-109

COMMENTS OF METROPCS COMMUNICATIONS, INC.

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MetroPCS Communications, Inc. ("MetroPCS"),[1] by its attorneys, hereby respectfully submits its comments on the *Further Inquiry* ("*Further Inquiry*") released by the Federal Communications Commission (the "FCC" or "Commission") in the above-captioned proceedings.[2] The *Further Inquiry* seeks comment on various industry proposals relating to reforming the universal service fund ("USF") and the intercarrier compensation ("ICC") system,

[1] For purposes of these Comments, the term "MetroPCS" refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

[2] *Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51 (rel. Aug. 3, 2011) ("*Further Inquiry*").

as part of the Commission's efforts to "comprehensively reform and modernize the [two regimes] in light of recent technological, market, and regulatory changes."[3] Specifically, the Commission seeks comment on the "proposal by the State Members of the Federal-State Universal Service Joint Board (State Members), the 'RLEC Plan' put forward by the Joint Rural Associations, and the 'America's Broadband Connectivity Plan' filed by six Price Cap Companies ('ABC Plan')."[4]

MetroPCS supports the Commission's efforts to reform the USF and ICC systems and views the emergence of these reform plans as strong evidence that the industry understands that the time has come for action. MetroPCS applauds the Commission for requesting public comment on these plans. MetroPCS generally supports the direction in which the RLEC Plan and the ABC Plan are heading but believes that comprehensive reform needs to occur sooner. In the interim, the Commission should not subject traffic that is not subject to access charges today to any form of access charge. In response, the following is respectfully shown:

I. INTRODUCTION AND SUMMARY

As it did in response to the recent *NPRM*[5] in this proceeding, MetroPCS applauds the Commission for its efforts to enact sorely needed reform of the USF and ICC systems. Reform is long overdue and the Commission should not miss this opportunity to adopt comprehensive reform that will resolve long standing issues and "reduce waste and inefficiency in the

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[3] *Further Inquiry* at 1.

[4] *Id*.

[5] *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-up,* WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109 (rel. Feb. 9, 2011) ("*NPRM*").

intercarrier compensation system,"[6] reduce opportunities for regulatory arbitrage, place all competing service providers on a level playing field, and reform the universal service program. As the Commission recently recognized, "universal service rules and [the] ICC system, designed for 20th century networks and market dynamics, have not been comprehensively reassessed in more than a decade, even though the communications landscape has changed dramatically."[7] This is especially true as voice and data networks continue to converge and broadband has become the mainstay of the telecommunications industry. The current ICC regime and USF programs, which were last substantively changed nearly 15 years ago, were designed to operate under market conditions and technologies vastly different from those that exist today and that are continuing to evolve rapidly.

When the ICC regime and USF programs originally were put in place, there were five regional Bell operating companies, voice was the predominate service, there were numerous unequivalent interexchange categories, wireless penetration was very low and limited to feature phones, and today's ubiquitous Internet was a far off dream. It made sense in the past to differentiate between voice and data services, as well as local and toll-services. The overarching concern was to make sure that everyone had affordable voice service. Convergence, consolidation and new technologies have transformed the communications landscape and rendered obsolete many of the jurisdictional and technological distinctions that existed and underlie the current compensation regime. Today, voice as a separate service is being subsumed by broadband, mobile penetration rates are approaching 100%, mobile Internet is a requirement, not a luxury, for many consumers, and distinctions between local and long distance have

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[6] *Id*. at ¶ 34.

[7] *NPRM* at ¶ 8.

disappeared with many wireline and wireless services plans offering unlimited calling without toll distinctions. Accordingly, the Commission should adopt an ICC plan in which the prevailing overall rate for all intercarrier compensation quickly moves to $0.0007 per minute-of-use ("MOU") for all voice traffic. While MetroPCS recognizes that some transition is needed to implement this important reform, the transition period must be short in order to minimize the continued efforts of some carriers to game the system with arbitrage schemes and to accelerate the point in time when carriers will be able to compete on a level playing field. Accordingly, MetroPCS strongly supports the move to a $0.0007/MOU rate for intercarrier compensation and reciprocal compensation, as recommended in the ABC Plan, with an eventual move to a bill-and-keep regime, but to shorten the transition period to four years.

MetroPCS also recommends that the Commission be mindful of the fact that the current ICC regime discriminates against wireless carriers by refusing to allow them to collect ICC for interMTA calls except by voluntary agreement. Since wireless carriers are increasingly competing with wireline services – as demonstrated by recent study which show that over 26% of all users have cut the cord[8] – the inability of wireless carriers to receive ICC for interMTA calls puts wireline carriers at an unfair competitive advantage. Rather than requiring wireless carriers to be paid ICC for interMTA calls on an interim basis, MetroPCS favors accelerating the implementation of overall reform to reduce the discrimination by reducing the ICC received by wireline carriers.[9]

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[8] Mike Snider, "More people ditching home phone for mobile," USA Today (Apr. 21, 2011) (citing study by National Center for Health Statistics), *available at* http://www.usatoday.com/tech/news/2011-04-20-cellphone-study.htm.

[9] If, however, the Commission decides to create greater parity by bringing VoIP carriers into the current access charge system, it should at the same time eliminate the anomalous situation that wireless carriers are obligated to pay access charges but not to receive terminating access.

MetroPCS further commends the Commission for its consideration in this proceeding of ways to eliminate the serious problem of traffic stimulators and traffic pumpers, and the ABC Plan's proposal to move compensation rates to no greater than $0.0007/MOU is a critical first step in this journey. As MetroPCS consistently has stated, traffic pumping is a growing problem in both the local exchange and interexchange markets that plagues the industry and generates wasteful, unproductive increases in the intercarrier compensation costs incurred by carriers, which in turn unnecessarily raises the cost of service to all customers. The public interest will be served if the Commission acts promptly to curb such dis-economic arbitrage, both in the context of access charges and reciprocal compensation, by capping all ICC and access charges at $0.0007/MOU. MetroPCS' experience indicates that traffic pumping is a growing problem with traffic stimulators moving from traditional wireline interexchange services to wireless services.[10] Moreover, traffic pumping is a particularly acute problem for a competitive mid-tier carrier, such as MetroPCS, which offers affordable service on an unlimited paid-in-advance, tax-inclusive, flat-rate basis. The success of the MetroPCS business model clearly demonstrates that customers want unlimited local and interexchange service for a flat fee. Traffic pumping endangers the very viability of this popular business model because flat-rate carriers cannot pass excessive termination charges on to their customers as easily as usage-based carriers. Post-paid carriers are well-positioned to meter and bill after-the-fact for the services they provided. However, some traffic pumpers prey on flat-rate carriers by encouraging mobile customers with fixed monthly rates for unlimited service to call numbers with high termination charges thereby shifting the burden of the excessive termination fees to the flat rate carrier. These sorts of abuses of flat rate

[10] Indeed, MetroPCS is seeing a growing sophistication associated with traffic pumpers and integration with (or at least services provided by) rural and competitive local exchange carriers.

services increase the overall cost of service for all customers and ultimately could jeopardize "all-you-can-eat" service plans. Obviously, not all rural or competitive local exchange carriers have excessive termination rates and engage in traffic pumping. However, traffic pumpers prey on the Commission's proclivity to protect and nurture carriers that serve rural communities. By doing so, the current rules are being exploited by carriers who use these well-meaning rules to extract significant amounts from other carriers. The best approach to stem this abuse is to limit the amount of traffic imbalance that exists before the $0.0007 rate is applied. Just as the 3:1 ratio limited arbitrage fees ISP-bound traffic, imposing a similar cap here will limit the ability of traffic pumpers to abuse the current ICC system. Thus, MetroPCS advocates Commission action which would immediately put all traffic that is exchanged at a ratio of over 3:1 at $0.0007.

Finally, MetroPCS does not believe that the proposed creation of a new mobility fund is necessary or the best use of any excess USF subsidies. Rather, these funds should be used in today's uncertain economic times to reduce the USF contributions of all carriers, which will free them to expand broadband services across the nation without ongoing government involvement and/or allow them to reduce the amount of USF contributions they seek from their customers. In this way, the Commission can promote consumer savings while at the same time supporting the laudable goals of increasing broadband deployment, as outlined in the Commission's *National Broadband Plan*.[11]

[11] Federal Communications Commission, *Connecting America: A National Broadband Plan for Our Future*, 3 (2010) ("*National Broadband Plan*").

II. METROPCS STRONGLY SUPPORTS THE NEAR-TERM ADOPTION OF AN INTERIM $0.0007 TERMINATION RATE AND THE ULTIMATE IMPLEMENTATION OF A BILL-AND-KEEP REGIME

The Entire Industry Should Transition To Bill-and-Keep, Or At Least To $0.0007/MOU, As Quickly As Possible. MetroPCS consistently has advocated for a bill-and-keep regime, but as an interim measure MetroPCS strongly supports the adoption of the $0.0007 rate proposed in the ABC Plan.[12] The ABC Plan-recommended $0.0007/MOU rate represents an accurate approximation of the actual cost to terminate traffic based on the fact that it is the prevailing rate in the competitive portions of the marketplace.[13] Ultimately, though, MetroPCS supports a bill-and-keep intercarrier compensation regime for all traffic, including interconnected VoIP traffic. As articulated previously by MetroPCS throughout the debate on comprehensive reform, a bill-and-keep system removes the incentive for traffic arbitrages and traffic pumpers to "game the system" by deliberately seeking out arbitrage opportunities. Bill-and-keep discourages terminating carriers from implementing excessive termination rates and then sharing revenues with customers who originate large volumes of one-way traffic thereby generating significant terminating revenue.[14] A bill-and-keep regime also would eliminate antiquated regulatory distinctions between technologies and services. The current distinctions between local, toll and long distance are quickly evaporating as carriers offer unlimited dialing plans. Further, the

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[12] *See, e.g.*, *Further Inquiry* at 15.

[13] This is because the Commission had the foresight in the ISP Remand Decision to require incumbent local exchange carriers to exchange all traffic at this rate if they wanted the benefit of this rate for dial up traffic going to ISPs serviced by competitive local exchange carriers. Accordingly, the majority of local traffic today exchanged between wireless carriers and ILECs is exchanged at the $0.0007 rate.

[14] This also would eliminate other forms of fraud, such as customers who sign up for unlimited long distance service and are compensated autodial numbers which cause the servicing carrier to incur access charges – many at hundreds of times the prevailing $0.0007/MOU rate.

current regime where switched voice is charged ICC and VoIP does not pay has lead to significant arbitrage. Since eventually most traffic will flow over VoIP, the only barriers to such migration are the antiquated ICC regimes. In the final analysis, each of these technologies offers the same end-user service and offers the customer the same opportunity to connect to many long-distance numbers on a low-cost, flat-rate basis. The solution, however, is not to bring VoIP traffic into an outmoded regime. Rather, it is to create parity by moving all traffic to bill-and-keep.

<u>A $0.0007/MOU Interim Rate Should Be Instituted Immediately For Imbalanced Traffic.</u> As an initial step toward reform, the Commission should adopt a uniform termination rate of no higher than $0.0007/MOU (as recommended in the ABC Plan), a 3:1 traffic presumption, and a traffic cap as a transitional step towards a bill-and-keep regime. MetroPCS submits that adopting this rate immediately would curb the severity of the traffic pumping problem while the entire industry transitions to a bill-and-keep regime. In addition to the immediate adoption of a $0.0007/MOU rate, the adoption of a 3:1 traffic presumption and an overall traffic cap would further deter traffic pumping schemes, as traffic pumpers would receive less revenue when the traffic is substantially unbalanced and would receive no revenue beyond a certain disproportionate amount of traffic. These limits should apply to both incoming switched voice and VoIP traffic to eliminate regulatory arbitrage. However, since VoIP traffic currently is not subject to ICC and access payments, it is important in the transition to not impose the current ICC/access rates on this traffic. Otherwise, there would be substantial unnecessary disruption and regulatory shock to the system as billions of minutes of VoIP traffic would suddenly be subject to the highly outdated ICC/access rates. The better approach is to determine where the ICC rates will eventually end up (*e.g.*, $0.0007 or bill and keep) and only sweep VoIP traffic into

the regime at that point. This will create the proper incentive to effect the final equitable solution as soon as possible and, in the interim, reduce regulatory shock.

In sum, the $0.0007/MOU rate proposed in the ABC Plan, if adopted, represents a promising first step in reforming the ICC regime, but the Commission must go further. While the industry undergoes this transition, the Commission should immediately take action to remedy the traffic pumping problem by moving all traffic that is imbalanced in a ratio of 3:1 or greater to a $0.0007/MOU rate. The Commission then must see the journey through moving all traffic to bill-and-keep.

III. THE COMMISSION MUST TAKE A CENTRAL ROLE IN EFFECTUATING INTERCARRIER COMPENSATION REFORM

As the Commission has properly noted, reforming the ICC system and eliminating wasteful arbitrage opportunities, requires "a uniform, consistent framework across all states."[15] As a wireless carrier with operations in and around metropolitan areas throughout the United States, MetroPCS prefers a uniform approach to ICC across all states. Since the Commission has preempted most state regulation for wireless services, requiring states to set ICC for wireless to wireline and vice versa makes no sense. The Commission clearly has the authority under section 332 to establish special rules with respect to wireless services and the Commission should do so with respect to ICC. Further, MetroPCS would have significant reservations about any approach that leaves an important part of the overall reform process in the hands of each individual state. If the enactment of reforms is left to individual states, uncertainty and inconsistencies will be injected into the ICC system in the near term and opportunities for regulatory arbitrage will increase. This is a particular concern for wireless services which

[15] *Further Inquiry* at 11.

generally are provided on a wide-area, regional or national basis. Further, since wireless carrier services are not generally regulated by the states, state public utilities commissions have less knowledge about wireless services and less incentive to ensure that wireless carriers receive fair and equal treatment. Finally, to subject wireless carriers to a patchwork of state rate regulation in 50 states would not serve the public interest since it will require wireless carriers to participate in a multitude of state proceedings. Consequently, MetroPCS prefers a central role for the FCC. At the very least, the Commission must provide meaningful guidance to states during the course of ICC reform, require states to abide by strict timelines, provide a federal backstop if states fail or refuse to act as provided by the Commission, and encourage states to implement reforms as promptly as possible.

If the Commission truly seeks timely, comprehensive and consistent reforms, it cannot afford to defer to the states. State-by-state action is particularly inappropriate to govern wireless carriers, which were purposefully subjected by Congress to a federal regime, a fact that the Commission recognized in the *NPRM*.[16] The anxiety of wireless carriers over the possibility of being dragged into a multitude of 50 separate state commissions is well-founded. As MetroPCS noted in its April 1 comments in this proceeding, CMRS providers already are involved in compensation proceedings before at least six state PUCs,[17] and federal courts have heard related

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[16] *NPRM* at ¶ 538.

[17] *See, e.g.*, *Application of North County Communications Corporation of California (U5631C for Approval of Default Rate for Termination of Intrastate, IntraMTA Traffic Originated by CMRS Carriers*, Calif. PUC A.10-01-003 (filed Jan. 6, 2010) (North County Communications asked the CPUC to establish a default compensation rate of $0.0110 for terminating wireless traffic in the absence of a negotiated agreement and to establish a “just and reasonable” rate for the termination of wireless traffic generally); *Pac-West Telecomm, Inc. (U5266C) vs. Sprint Spectrum L.P., et al*, Calif. PUC Case 09-12-014, 10-01-019, 10-01-020, 20-01-021 (filed Dec. 9, 2009) (Pac-West sought intrastate termination fees from CMRS providers, who in turn alleged traffic pumping); *Aventure Communication Technology, L.L.C.*, Iowa Util. Board TF-2010-0087

disputes arising in at least three other states.[18] The Commission must not further contribute to this disruptive trend. Shielding wireless carriers from a patchwork of inconsistent state regulations is precisely what Congress intended when it preempted state regulation of wireless rates and declared that wireless carriers should be subject to a single federal regime. Requiring CMRS providers to have their day-to-day businesses impacted by rate proceedings in a multitude of states goes against the congressional intention of having a single federal CMRS policy.

If the Commission decides to eschew national regulation for wireless interconnection rates, the Commission must establish clear guidance to the state regulatory commissions to ensure that the federal mandate of reforming ICC is achieved, and done so in a timely manner. The Commission must instruct states to use a well-defined incremental cost-based methodology to set rates and the timeframes during which action must take place. The Commission must instruct states that the interim rate should never exceed $0.0007/MOU. And, any interim rate

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(2010) (after filings by Sprint, T-Mobile, and AT&T, the Iowa Utilities Board suspended the proposed tariff of Aventure to determine its legality, also noting that it may be in violation of its previous traffic pumping decisions); *Sprint Comms. Co. L.P. v. Bluegrass Telephone Co.*, Kentucky PSC 2010-00012 (2010) (Sprint filed a complaint against Bluegrass Telephone Company alleging unlawful access charges and traffic pumping); *Qwest Comms. Co. v. Tekstar Comms., Inc.*, Minn. PUC C-09-265 (involving traffic pumping allegations related to litigation between Sprint and Tekstar, and with T-Mobile, AT&T, and Verizon intervening); *Petition of XChange Telecom Corp. for a Declaratory Ruling Establishing the Just and Reasonable Rates for Termination of Traffic Between Wireless Carriers and CLECs*, NY PSC 09-C-0370 (XChange filed a complaint against Sprint for nonpayment of termination fees); *Complaint filed by South Dakota Network, LLC against Sprint Communications Company L.P. Regarding Failure to Pay Intrastate Centralized Equal Access Charges and to Immediately Pay Undisputed Portions of SDN's Invoices*, S. Dakota PUC TC09-098 (SDN filed a complaint against Sprint for nonpayment of intrastate access charges, and Sprint counterclaimed, in part, that SDN should have known SDN participating telecommunications carriers were committing traffic pumping and that SDN had unlawfully billed Sprint for delivered calls).

[18] While, to MetroPCS' knowledge, no cases are currently pending before the PUCs in these states, federal courts in Arizona, Oregon, and Utah have been presented with allegations of traffic pumping. *See* CTIA – The Wireless Association *Ex Parte*, in WC Docket No. 07-135 and CC Docket No. 01-92 (filed Nov. 24, 2010).

should be subject to regular steps downward to get to bill-and-keep within four years. Allowing state commissions to set rates that are not cost-based or that would linger for a longer period of time would be contrary to the public interest.

Further, the Commission must provide a mechanism to set state rates if the state regulatory commission fails or refuses to adopt the necessary rate changes. Just as section 252 establishes a default mechanism if the state commission fails to arbitrate an interconnection arrangement within the timeframes set forth in that section, the Commission here needs to establish that it will set the rates if the state regulatory commission fails or refuses to do so within the timeframes established by the Commission. By setting up such a backstop arrangement, state commissions will be deterred from dragging their feet since rates will be set despite their inaction.

IV. RECENT JUDICIAL DECISIONS AFFIRM THE COMMISISON'S CLEAR LEGAL AUTHORITY TO CURB ABUSIVE TRAFFIC PUMPING

As noted above, MetroPCS is in favor of the ABC Plan's proposed adoption of a $0.0007/MOU rate for all traffic. The Commission should feel confident of its authority to adopt this proposal, and eventually to move to a bill-and-keep regime, as it finds itself on a solid legal foundation to regulate both inter- and intrastate termination rates. In the *NPRM*, the Commission sought comment on the scope of its statutory authority to regulate intrastate termination rates under section 332 of the Act, 47 U.S.C. § 332. A recent decision of the D.C. Circuit in which MetroPCS was the moving party has confirmed that the Commission's section 332 authority extends to intrastate termination compensation, and is broad enough to permit all of the federal regulatory options that the Commission is currently contemplating.[19]

In discussing its statutory authority to reform intercarrier compensation, the Commission observed in the *NPRM* that section 332 clearly empowers the Commission to regulate interstate wireless termination charges and intrastate rates charged by wireless carriers.[20] Furthermore, the Commission noted that "there is support for the proposition that section 332 also gives the Commission authority to regulate the intercarrier compensation rates *paid by wireless carriers for intrastate traffic* – including charges that would otherwise be subject to intrastate access charges."[21] The Commission pointed to the decision of the Eighth Circuit in *Iowa Utilities Board*,[22] which relied (among other things) on the exemption of section 332 from section 2(b)'s proscription of Commission jurisdiction over intrastate telephony.[23] Section 332, the Eighth Circuit held, granted the Commission the power to issue "reciprocal compensation rules that encompass intrastate charges imposed by wireline providers on wireless providers."[24] The Commission further recognized that "in its 2005 *T-Mobile Order*, the Commission relied upon its authority under section 201 and 332 to adopt a rule prohibiting LECs from imposing a compensation obligation for non-access traffic pursuant to tariff."[25]

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[19] *See* Slip Opinion, *MetroPCS California LLC v. FCC*, No. 10-1003 (D.C. Cir. May 17, 2011) (attached).

[20] *NPRM* at ¶ 511.

[21] *Id.* (emphasis added).

[22] *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *vacated in part and remanded on other grounds*, *Iowa Utilities Board*, 525 U.S. 366 (1999) ("*Iowa Utilities Board*").

[23] *NPRM* at ¶ 511.

[24] *Id.*

[25] *Id.*

The D.C. Circuit's recent decision in *MetroPCS California* confirms the breadth of the Commission's section 201/332 authority, which extends to all of the various regulatory options that the Commission is now considering to redress traffic-pumping arbitrage.[26] In *MetroPCS California*, North County (a competitive local exchange carrier) had filed a complaint with the Commission, seeking to recover intrastate termination charges from MetroPCS (a wireless carrier) under the Commission's regulation requiring that wireless carriers pay "reasonable compensation" to other carriers for the termination of their traffic.[27] Invoking its "policy of leaving the setting of termination rates for intrastate traffic to state authorities," the Commission held North County's claim in abeyance so that North County could petition the California Public Utility Commission to set an intrastate termination rate.[28]

MetroPCS challenged the Commission's decision to defer jurisdiction in the D.C. Circuit. MetroPCS argued that, given the express exclusion of section 332 from section 2(b), the Commission had plenary authority to regulate both interstate and intrastate wireless rates under sections 201 and 332.[29] Accordingly, given the pre-emption of state tariffing of intercarrier termination rates by the *T-Mobile Order*,[30] the Commission was required to resolve North County's section 208 complaint and determine what (if any) compensation was owed, rather than

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[26] *See NPRM* at ¶¶ 673-74.

[27] *See* 47 C.F.R. § 20.11(b)(2).

[28] *MetroPCS California*, slip op. at 3.

[29] *Id*. at 4.

[30] *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005) *petitions for review pending*, *Ronan Tel. Co. et al. v. FCC*, No. 05-71995 (9th Cir. filed Apr. 8, 2005).

to punt that issue to state commissions.[31] "[C]onceding the federal interest in the establishment of reasonable rates for terminating the traffic of a CMRS provider" and not disputing the breadth of its section 201 and 332 authority, the Commission argued instead "that there is nothing in the Communications Act or Rule 20.11(b) that requires the FCC to be the instrumentality that actually sets the rates for wholly intrastate communications."[32]

The D.C. Circuit agreed with the Commission. The Court noted that the Commission's "authority to regulate intrastate termination rates" under sections 201 and 332 "does not require the FCC to set them in every instance."[33] The Commission's mandatory statutory obligation is "at most . . . ensuring reasonable rates for mobile radio services, even those that are wholly intrastate," and "[t]here are a number of ways the FCC can ensure a rate is just and reasonable short of setting the rate itself, not least of which is reviewing the rate after it is set by state regulatory authorities."[34] At the end of the day, the Court held, "the Communications Act gives the FCC broad discretion to determine when 'establish[ing] ... charges' would be necessary or desirable in the public interest."[35] Even though section 332 is exempt from section 2(b) of the Act, it was within the Commission's discretion in implementing its "reasonable compensation" regulation to choose a "policy" of allowing state commissions to fix intrastate termination rates in keeping with the traditional dual jurisdiction scheme of 2(b).[36]

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[31] *See id.*

[32] *Id.*

[33] *MetroPCS California*, slip op. at 4.

[34] *Id.* at 5.

[35] *Id.* (brackets in original) (quoting 47 U.S.C. § 201(a)).

[36] *MetroPCS California*, slip op. at 5-6.

The D.C. Circuit's *MetroPCS California* decision thus clearly establishes that the Commission indisputably "has the authority under sections 201 and 332 to take measures to reduce wireless termination charges for both intrastate and interstate traffic."[37] How to do so is simply a matter of the Commission's policymaking discretion. The Commission has the discretion, subject to the prohibition against arbitrary and capricious agency action, to continue the *North County* regime of deferring to state commissions to fix termination rates, but subject to the Commission's oversight to ensure that the rates are just and reasonable. But it also clearly has the discretion to adopt ratemaking methodologies that the state commissions would implement for wireless-wireline traffic; to impose bill-and-keep; and to adopt a federal $0.0007/MOU rate for intrastate termination charges, as recommended in the ABC Plan.[38] As the D.C. Circuit emphasized, the Commission has broad discretion under section 201 and 332 to "determine when 'establish[ing] ... charges' would be "necessary or desirable in the public interest."[39]

As discussed above, the proper course for the Commission to pursue as a matter of federal policy is to impose a bill-and-keep regime, or a rate cap of $0.0007 per MOU, for traffic that is imbalanced by a ratio of 3:1 or greater. This regime should be applied to both the interexchange and local reciprocal compensation markets as soon as possible, as it is clear that the Commission has the necessary legal authority to adopt such a rule. Such a rule would help resolve the extreme arbitrage caused by the current practice of traffic stimulation, and would be

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[37] *NPRM* ¶ 511.

[38] *See NPRM* at ¶¶ 673-74 (seeking comment on these options).

[39] *MetroPCS California*, slip op. at 5 (brackets in original) (quoting 47 U.S.C. § 201(a)).

preferable to a rule that requires a determination of the existence or nature of a revenue sharing arrangement as a mechanism to curb disruptive traffic pumping or traffic stimulation activities.

V. VOIP TRAFFIC ULTIMATELY WILL BE TREATED THE SAME AS OTHER TRAFFIC WHEN ALL CARRIERS OPERATE UNDER BILL-AND-KEEP

The *Further Inquiry* seeks comment on “the implementation of the ABC Plan’s proposal for VoIP intercarrier compensation,” including the recommendation that “VoIP traffic [] be subject to intercarrier compensation rates different from rates applied to other access traffic during the first part of the transition.”[40] MetroPCS believes that, ultimately, all communications traffic should be subject to a common framework. Until that eventuality, however, MetroPCS believes that it would be a mistake to apply the current, broken interconnection framework to VoIP traffic. Instead, MetroPCS recommends that the Commission bring VoIP into the fold only once all traffic is settled where ICC rates eventually will end up (*e.g.*, \$0.0007/MOU or bill-and-keep).

As an initial matter, metered intercarrier payment regimes rely on traffic being measured by minutes of use or some proxy for it. Since VoIP traffic comes in a stream of packets which, unlike circuit switched traffic, does not fully occupy a circuit, this traffic can be difficult to measure while in IP form. Thus, a compensation regime based on per-minute charges simply is incompatible with an IP-based telecommunications architecture and requires IP traffic be converted to switched voice traffic *solely* to determine compensation and then be reconverted to IP – the very height of waste and inefficiency. Indeed, any regime which differentiates between types of traffic (*e.g.*, voice vs. data) on an IP network may be fatally inconsistent, as both voice and data packets impose the same costs on the terminating carrier. It would make no sense to

[40] *Further Inquiry* at 17.

allow a terminating carrier to charge for voice packets but receive no payment for data packets. And, because voice traffic is projected to represent a rapidly declining portion of total traffic, it would be a mistake for the Commission to graft the current payment system onto the IP traffic, since this would only transfer the problems inherent in voice compensation to compensation for data traffic. Rather than leveling the playing field, that approach would perpetuate a broken regime. Instead, the existing bill-and-keep compensation system for data should be retained and adopted for voice traffic.

In addition, bringing VoIP traffic under the current ICC regime would only serve to intensify the inequity suffered by wireless carriers, who are not permitted to collect access charges.[41] As has been often noted by MetroPCS, wireless carriers, particularly those who act as a significant landline displacement (such as MetroPCS), are disadvantaged by not receiving access revenue. To permit VoIP carriers to collect access charges under any interim revised ICC system would further tilt the playing field away from wireless carriers, particularly because VoIP, wireless and wireline traffic now all compete with one another for the same customers. The Commission has correctly recognized that "the market is evolving toward broadband, all-IP networks."[42] As noted in its earlier comments filed in this proceeding, MetroPCS supports a bill-and-keep intercarrier compensation regime for all traffic, including interconnected VoIP traffic.[43] Because a number of services, including many wireless, wireline and VoIP services, now include a flat-rate long distance feature as part of the local service plan, there is little need for the

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[41] MetroPCS supports Commission rules mandating wireless access charges, but only to the extent that such traffic is not subject to an ongoing bill-and-keep arrangement, *de facto* or otherwise.

[42] *NPRM* at ¶ 609.

[43] *See* Comments of MetroPCS Communications, Inc. at 14-15 (filed April 1, 2011) ("MetroPCS Comments").

Commission to continue to make substantial regulatory distinctions among these technologies in the intercarrier compensation regime.[44] Furthermore, as the communications landscape increasingly evolves into an all-IP world, IP traffic interconnection will become increasingly important. In recognition of this fact, the Commission should affirmatively conclude that, to the extent a carrier is obligated to provide interconnection, it must also provide interconnection for IP traffic, to the extent technically feasible. Only by harmonizing IP traffic interconnection obligations can the Commission fully equip next-generation communications systems for the future.

VI. USF SUPPORT FOR MOBILE BROADBAND IS NOT AN EFFICIENT OR PROPER USE OF FUNDS

The *Further Inquiry* also seeks comment on "providing ongoing support for mobile voice and broadband service in areas that are uneconomic to serve with mobile service (*i.e.*, a Mobile Connect America Fund)."[45] In the context of the Mobile Connect America Fund, the *Further Inquiry* asks for comment on "providing separate funding for fixed broadband (wired or wireless) and mobility."[46] While the proposed Mobile Connect America Fund is well-intentioned, MetroPCS continues to believe that the Commission should not use any excess USF resources for the purposes of creating a new fund. Rather, given the economic uncertainties facing the entire country, the better use of these funds would be as a reduction in the amount of USF contributions taken from wireless carriers each year. This approach would make additional

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[44] As noted above, however, VoIP and other IP traffic should not be subjected to the current, broken ICC system. Instead of applying an antiquated system to new technologies, the Commission should move rapidly to reform the ICC regime, at which point it can bring VoIP and other IP traffic into the fold under a bill-and-keep compensation methodology.

[45] *Further Inquiry* at 2.

[46] *Id*.

funds available for carriers that already have proven themselves willing and able to deploy networks across the country. Studies show that wireless broadband is proliferating, not just in major markets but also in small, rural and mid-tier markets. Reducing USF obligations would fuel this growth of networks in previously unserved and underserved regions. Returning this money to carriers also would allow them to return a portion back to their customers – who are the very ones who filled the USF coffers in the first place. Finally, allowing carriers and customers to decide how such USF funds should be allocated allows the market, rather than regulatory command and control policies, to determine how such money will be best spent. Carriers who can make money with additional investments will do so while diseconomic investments will be avoided. Any scheme that requires governmental oversight – such as mobility fund – has natural problems by warping the competitive landscape. Further, the Commission proposal to the reverse auctions will not save such a program because it will incent larger carriers to bid down rural services to the detriment of small rural carriers.

VII. TRANSIT RATES MUST BE ADDRESSED IN THE INTERCARRIER COMPENSATION REFORM

Although the *Further Inquiry* does not specifically address transit rates, MetroPCS believes that this is an important aspect of overall ICC reform. Transit does not appear to be part of either plan but it needs to be promptly addressed by the Commission. MetroPCS has asked the Commission to bring this type of traffic under its comprehensive ICC regime and unify transit services in accordance with its overall unified ICC plan.[47] MetroPCS proposed that the Commission adopt a rate for such traffic that is no greater than the actual long-term incremental cost for the provision of such traffic. MetroPCS noted that transit charges should be at the same

[47] *See* MetroPCS Comments at 29.

rate as the underlying network functionality provided on a unbundled network elements ("UNE") basis. This cost should be similar to the TELRIC cost charged for similar functionality for the provisioning of the various UNEs that comprise such service. MetroPCS stated that since the long-run incremental cost to terminate traffic (which is the same switching as provided for transit traffic) is $0.0007/MOU, a rate no higher should be used for transit traffic as well.

A recent case from the Connecticut District Court supports the view that transit traffic should be considered traffic governed by Section 251(c) of the Telecommunications Act of 1996 and that the rate should be set using TELRIC methodology.[48] In this case, the Connecticut District Court noted that:

> Reviewing the applicable FCC regulations and decisions as well as the relevant case law, the Court must conclude that interconnection under section 251(c) includes the duties to provide indirect interconnection *and to provide transit service*. The 1996 Act was passed to expand access and to promote competition within local telecommunications markets.[49]
>
> Transit service as understood in the law is the carrying of traffic between two CLECs. It does not include the final connection with the end-user. This distinction is critical for the law turns on the fact that transit and termination refers to the transfer of a signal to the CLEC and then the CLEC's transmission of the signal to the end user. . . . Because the DPUC's [Connecticut Department of Public Utility Control decision is not inconsistent with the 1996 Act of the FCC's regulations, the DPUC has the authority to conclude that the interconnection obligations included the obligation to provide TTS [transit traffic service]. 47 U.S.C. § 251(d)(3).[50]

The Connecticut District Court also noted, as far as pricing, that:

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[48] *The Southern New England Telephone Company d/b/a AT&T Connecticut v. Perlermino et al.*, 3L09-CV-1787 (WWE), Memorandum of Decision (D. Conn. May 2011) (attached).

[49] *Id.* at 8 (Emphasis Added).

[50] *Id.* at 12.

> Should the parties fail to reach an agreement, the DPUC can certainly require AT&T Connecticut to provide TTS at TELRIC-based rates, but only pursuant to sections 252(a)(2)-(b).[51]

Even though the Connecticut District Court did not specifically uphold TELRIC as the proper rate (it decided that negotiation was required first), its holding above provides support for MetroPCS' view that transit should be dealt with under the Telecommunications Act of 1996 and be part of the Commission's comprehensive intercarrier compensation reform – with a rate similar to TELRIC.

VIII. CONCLUSION

MetroPCS urges the Commission to take action in this proceeding, and not to lose the momentum it has gained through multiple rounds of comments in connection with meaningful, comprehensive USF and ICC reform. The emergence of these latest plans reflects the fact that the industry is ready for reform. As MetroPCS has urged in the past, the time for action is now. The Commission simply must mend this broken compensation mechanism, or risk stunting the growth of next-generation communications systems. In addition, rather than finding new ways to spend USF money, such as the Mobile Connect America Fund, the Commission should instead seek to reduce the size of the USF and return that money to carriers where it can be invested in necessary infrastructure upgrades and next-generation broadband technology.

[51] *Id.* at 15.

Respectfully submitted,

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August 24, 2011

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Attachment

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 14, 2010 Decided May 17, 2011

No. 10-1003

METROPCS CALIFORNIA, LLC,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

On Petition for Review of an Order
of the Federal Communications Commission

Stephen B. Kinnaird argued the cause for petitioner. With him on the briefs were *Carl W. Northrop* and *Michael Lazarus*.

Laurence N. Bourne, Counsel, Federal Communications Commission, argued the cause for respondent. With him on the brief were *Catherine G. O'Sullivan* and *Robert J. Wiggers*, Attorneys, U.S. Department of Justice, *Austin C. Schlick*, General Counsel, Federal Communications Commission, *Jacob M. Lewis*, Acting Deputy General Counsel, and *Richard K. Welch*, Deputy Associate Counsel. *Robert B. Nicholson*, Attorney, U.S. Department of Justice, and *Daniel*

M. Armstrong III, Associate General Counsel, Federal Communications Commission, entered appearances.

Before: BROWN, GRIFFITH and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

GRIFFITH, *Circuit Judge*: Providers of commercial mobile radio services must pay "reasonable compensation" to local exchange carriers for traffic that starts with the provider and ends in the carrier's network. 47 C.F.R. § 20.11(b)(2). The question in this case is whether the Federal Communications Commission erred in allowing a state agency to determine this rate for traffic that is wholly intrastate. For the reasons set forth below, we conclude that the FCC acted within its discretion and deny the petition for review.

I

Petitioner MetroPCS California, LLC, is a provider of commercial mobile radio services (CMRS) in California, and North County Communications Corporation is a California local exchange carrier (LEC) on whose network some of MetroPCS's traffic ends. All of the traffic between these two networks flows from MetroPCS to North County and takes place wholly within California. LECs like North County provide wired telephone service within a geographic region known as the local access and transport area (LATA). Calls travel over an LEC's network in a number of ways. Some originate within the LATA. Others arrive from outside the LATA via long-distance carrier, or, more recently, by radio telecommunications or voice-over-IP. Regardless of its source, the receiving LEC must ensure the call gets to the intended recipient, a service referred to as "terminating the traffic." The CMRS must pay the LEC "reasonable compensation" for that service. *See id.*

The dispute in this case arose when, in the absence of an agreement, North County unilaterally set a rate and began billing MetroPCS for the cost of terminating its traffic. MetroPCS refused to pay, and North County filed a complaint with the FCC alleging a violation of Rule 20.11(b).

Citing its policy of leaving the setting of termination rates for intrastate traffic to state authorities, the FCC ruled that it would hold the complaint in abeyance while North County petitioned the California Public Utilities Commission (CPUC) to set a rate. MetroPCS challenges this approach, arguing that the FCC must either set the rate itself or, at a minimum, issue guidance to the CPUC on how to set a reasonable rate. We have jurisdiction to review the FCC's Order pursuant to 28 U.S.C. § 2342(1).

Under the Administrative Procedure Act, we hold unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We review the FCC's interpretation of the Communications Act under the aegis of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), giving effect to clear statutory text and deferring to an agency's reasonable interpretation of any ambiguity. We afford the FCC deference in interpreting its own regulations. *MCI WorldCom Network Servs., Inc. v. FCC*, 274 F.3d 542, 547 (D.C. Cir. 2001).

II

MetroPCS argues that the FCC abused its discretion when it declined to set the "reasonable compensation" required by Rule 20.11(b)(2) and instead left that task to the

CPUC. The FCC, MetroPCS contends, must set this rate itself. Its argument begins with section 332 of the Communications Act, which grants the FCC authority to regulate commercial mobile services, 47 U.S.C. § 332(c), and specifically provides that "[u]pon reasonable request" of a CMRS provider, "the Commission shall order a common carrier [such as an LEC] to establish physical connections with such service pursuant to the provisions of section 201." *Id.* § 332(c)(1)(B). Section 201, in turn, requires that "[a]ll charges . . . and regulations" relating to traffic that results from such connections "be just and reasonable." *Id.* § 201(b). And Rule 20.11(b) specifically requires interconnected CMRS providers and LECs to pay each other "reasonable compensation" for terminating traffic. MetroPCS reads the interplay of sections 332 and 201 and Rule 20.11(b) to require the FCC, when asked, to set termination rates for traffic between CMRS providers and LECs, even traffic that is wholly intrastate. MetroPCS acknowledges a jurisdictional divide that leaves to the states authority over "charges . . . or regulations for or in connection with intrastate communication service," *id.* § 152(b). But it argues that Congress intended the FCC alone to regulate mobile radio services, as evidenced by the fact that section 152(b) applies "[e]xcept as provided in . . . section 332." *Id.*

While conceding the federal interest in the establishment of reasonable rates for terminating the traffic of a CMRS provider, the FCC argues that there is nothing in the Communications Act or Rule 20.11(b) that requires the FCC to be the instrumentality that actually sets the rates for wholly intrastate communications. The FCC asserts that the Communications Act and Rule 20.11(b) leave the agency free to do what it did here: order North County to first seek a rate from the CPUC. We agree. The provisions upon which MetroPCS relies demonstrate at most that the FCC is charged with ensuring reasonable rates for mobile radio services, even those that are wholly intrastate. But the authority to regulate intrastate termination rates does not require the FCC to set them in every instance. There are a number of ways the FCC can ensure a rate is just and reasonable short of setting the rate itself, not least of which is reviewing the rate after it is set by state regulatory authorities. In fact, the Communications Act gives the FCC broad discretion to determine when "establish[ing] . . . charges" would be "necessary or desirable in the public interest," *id.* § 201(a), and it is well established that we afford "substantial judicial deference" to the FCC's judgments on the public interest, *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). This discretion includes allowing the state agency to exercise its traditional authority to set rates for wholly intrastate communication services.

In the absence of statutory text plainly requiring otherwise, we have little trouble concluding under *Chevron* step two that the FCC reasonably determined that the FCC had no duty to set the rates for the wholly intrastate traffic at issue here. The FCC's policy of allowing state agencies to set such rates is consistent with the dual regulatory scheme assumed in the Communications Act, which grants the FCC authority over interstate communications but reserves wholly intrastate matters for the states. *See* 47 U.S.C § 151 (providing the FCC "shall execute and enforce the provisions of this chapter"); *id.* § 152(a) ("The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio . . . ."); *id.* § 152(b) ("[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier"). Of course, that divide is neither absolute nor always clear, and the Supreme Court has recognized the FCC may regulate intrastate matters "where it [is] not possible to separate the interstate and the intrastate components of the asserted FCC regulation." *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986) (emphasis omitted).

Accordingly, the FCC has determined that it was possible to require reasonable compensation under Rule 20.11(b) without preempting the states' traditional authority to set rates for terminating intrastate traffic. *See In re Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Servs.*, Second Report and Order, 9 FCC Rcd. 1411, ¶ 231 (1994) ("LEC costs associated with the provision of interconnection for interstate and intrastate cellular services are segregable."). The FCC made clear, however, that it would not hesitate to preempt any rates set by the states that would undermine the federal policy that encourages CMRS providers and LECs to interconnect. *See id.* ¶ 228. This is consistent with what Congress intended.

The FCC has done no differently in subsequent orders. *See, e.g., In re Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Pet. for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd. 4855, ¶ 10 n.41 (2005) (declining "to preempt state regulation of LEC intrastate interconnection rates applicable to CMRS providers"); *In re AirTouch Cellular v. Pac. Bell*, 16 FCC Rcd. 13502, ¶ 14 (2001) ("[A]lthough LECs were required to pay mutual compensation to CMRS carriers for intrastate traffic pursuant to Commission rules, the determination of the actual rates charged for intrastate interconnection would be left to the states."). Similarly, the FCC here refused "to preempt state regulation of intrastate rates that LECs charge CMRS providers for termination," instead determining that the CPUC "is the more appropriate forum for determining a reasonable [termination] rate" for wholly intrastate traffic. *North County Commc'ns Corp. v. MetroPCS Cal., LLC*, 24 FCC Rcd. 14036, ¶¶ 1, 14 (2009). This result reflects how Rule 20.11(b) has worked from the start, and accords with how the Communications Act operates generally. That seems perfectly reasonable to us.

A different conclusion is not warranted by MetroPCS's concern that allowing states to set intrastate rates will create a patchwork of regulatory schemes throughout the states and undermine Congress's understanding that "mobile services . . . by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. REP. NO. 103-111, at 490 (1993). The FCC's policy allows state agencies to set intrastate termination rates only insofar as the state regulations do not interfere with federal policies. That is the case here, as allowing state agencies to set intrastate termination rates furthers the federal policy of encouraging and compensating interconnection while retaining the dual regulatory structure created by subsections 152(a) and (b) of the Communications Act. That there are fifty states to deal with in the context of intrastate services is a consequence of congressional respect for federalism, not the FCC's approach. More fundamentally, the FCC's reasonable reading of the Communications Act and Rule 20.11(b) is not disturbed by MetroPCS's wish that the FCC do it all, which finds no expression in the statute. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting) ("'The Act must do everything necessary to achieve its broad purpose' is the slogan of the enthusiast, not the analytical tool of the arbiter.").

III

MetroPCS's remaining arguments fare no better. It argues that the FCC did not adequately explain why the CPUC was a "more appropriate forum" for setting intrastate rates in California. But the Commission's Order clearly states that its position is, and always has been, that intrastate termination rates are the business of states, and that Rule 20.11(b) does not disturb this. *See North County*, 24 FCC Rcd. 14036. The Order acknowledged the various policy arguments raised by MetroPCS, particularly about avoiding a patchwork of state regulations in the face of companies who generate only inbound traffic, but concluded that "[w]hether to depart so substantially from such long-standing and significant Commission precedent [and to proceed to regulate intrastate rates on this basis] is a complex question better suited to a more general rulemaking proceeding." *Id.* ¶ 16 (internal quotation omitted).

Finally, MetroPCS argues that the FCC acted arbitrarily when it refused to give guidance to the CPUC on how to determine a reasonable rate. According to MetroPCS, such guidance is critical and required by section 201. This is but a different telling of the same argument that we have already rejected. That the FCC *can* issue guidance does not mean it must do so. And to do so here would hardly be consistent with the longstanding policy of leaving wholly intrastate matters to the states.

IV

For the foregoing reasons, the petition for review is

Denied.